

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID WAYNE CLUESMAN,

Defendant-Appellant.

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UNPUBLISHED

April 19, 2011

No. 296808

Oakland Circuit Court

LC No. 2009-227076-FC

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of conspiracy to deliver or possess with intent to deliver 450 to 999 grams of cocaine, MCL 750.157a; MCL 333.7401(2)(a)(ii), and delivery of 450 to 999 grams of cocaine, MCL 333.7401(2)(a)(ii). Defendant was sentenced, as a second habitual offender, MCL 769.10, to 10 to 45 years' imprisonment for both the conspiracy and delivery convictions. We affirm.

Defendant contends that the prosecution failed to produce sufficient evidence to sustain his convictions. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We must "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Further, we are to draw all reasonable inferences and resolve all evidentiary conflicts in favor of the jury's verdict. *Id.* at 400. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *Id.*

To support a conviction for the conspiracy charged here, the prosecution was required to prove that (1) defendant possessed the specific intent to deliver the quantity of cocaine mixture charged; (2) defendant's coconspirators possessed the specific intent to deliver the quantity of cocaine mixture charged; and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory quantity of cocaine mixture charged to a third person. *People v Mass*, 464 Mich 615, 629-630, 633; 628 NW2d 540 (2001); *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).

A conspiracy is an express or implied mutual agreement or understanding “between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means.” *People v Cotton*, 191 Mich App 377, 392; 478 NW2d 681 (1991); MCL 750.157a. To prove the intent to combine with others for an unlawful purpose, it must be shown that the intent, including knowledge, was possessed by more than one person. *People v Blume*, 443 Mich 476; 505 NW2d 843 (1993). For intent to exist, the defendant must know about the conspiracy, know the conspiracy’s objective, and intend to participate cooperatively to further the objective. *Id.* at 485. Direct proof of a conspiracy is not essential; rather, the coconspirators’ intentions may be inferred from the circumstances and their acts and conduct. *Justice (After Remand)*, 454 Mich at 347. “What the conspirators actually did in furtherance of the conspiracy is evidence of what they agreed to do.” *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002).

Defendant argues that the prosecution failed to provide sufficient evidence of an agreement to deliver cocaine. The record reveals that the evidence was sufficient to support defendant’s conviction of conspiracy to deliver 450 to 999 grams of cocaine. Defendant admitted to the police that he was aware that his sons were cocaine traffickers. He also allowed his sons to use his home, the Regina house, to mix, press, and package the cocaine. The evidence also revealed that defendant allowed his son Michael Cluesman to use his vehicle to accompany his brother and act as a look out on one of their drug transactions. Defendant also admitted to sampling the cocaine and advising his sons of the quality of the cocaine. On August 30, 2009, defendant also provided his sons with various tools to use in the processing and packaging of the cocaine, including a bowl, microwave, blender, and kilo press. This evidence, when viewed in the light most favorable to the prosecution, would permit rational jurors to find that defendant combined<sup>1</sup> with his sons to deliver cocaine as defendant gave his sons the opportunity to run their illegal operation from his house, provided them with the tools to process the cocaine, and provided them with advice.

But an additional element of the conspiracy charged here included that defendant specifically intended the delivery of a mixture containing cocaine weighing between 450 to 999 grams. *Mass*, 464 Mich at 638-639. In order to sustain defendant’s conviction of conspiracy to deliver 450 to 999 grams of cocaine, there must be sufficient evidence to support a rational fact-finder’s conclusion that it was established beyond a reasonable doubt that defendant specifically agreed that a delivery of a mixture containing cocaine, weighing at least 450 grams, occur. *Id.*

There was no direct evidence that defendant ever had any conversation with anyone regarding specific quantities of cocaine. Defendant admitted to being familiar with cocaine and was often present when his sons mixed, processed, and packaged the cocaine. Defendant was also present when his sons returned from various drug runs with significant amounts of cash. Specifically, on April 30, 2009, the evidence shows defendant was present when his sons were packaging over 450 grams of cocaine. In fact, according to Rocky Johnson, defendant was

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<sup>1</sup> “The term ‘combine’ means that all the participants formed an agreement, express or implied, to accomplish the objective of the conspiracy.” *Justice (After Remand)*, 454 Mich at 345 n 19.

present in the living room when Michael weighed the cocaine on the living room table, added more cutting agent, and wrapped the cocaine. According to Rocky, the cocaine initially weighed about 660 grams. Further, Rocky testified that defendant subsequently visually inspected the cocaine, suggesting it was of poor quality. Viewing this evidence in the light most favorable to the prosecution, a rational fact finder could infer that defendant was aware of the quantity of cocaine mixture involved as he was present when it was packaged and weighed.

Additionally, when a defendant is charged with both delivery and conspiracy to deliver a controlled substance and the evidence proves the weight of the substance delivered, this evidence “may suffice to demonstrate defendant’s knowledge of the amount for the conspiracy charge.” *Mass*, 464 Mich at 634. The evidence produced at trial established that 977.3 grams of cocaine were delivered. Accordingly, this evidence was sufficient to permit rational jurors to find beyond a reasonable doubt that defendant conspired to deliver that amount of cocaine.

Defendant next argues that there was insufficient evidence to support his conviction of unlawfully delivering 450 to 999 grams of cocaine on an aiding and abetting theory. Aiding and abetting is not a separate offense, but instead is a way to impose vicarious liability for accomplices to a substantive offense. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). Three elements are necessary to establish criminal liability under an aiding and abetting theory:

“(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.” [*People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).]

The elements of unlawful delivery of cocaine as charged here are (1) the defendant delivered a controlled substance, (2) the substance delivered was cocaine, (3) the defendant knew it was cocaine, and (4) the substance was in a mixture that weighed more than 450 grams but less than 999 grams.<sup>2</sup> MCL 333.7401(2)(a)(ii); CJI2d 12.2. Notably, “knowledge of the amount of a controlled substance is not an element of a delivery charge” because “delivery of a controlled substance is a general intent crime.” *Mass*, 464 Mich at 627. And so to convict on an aiding and abetting theory, it is “enough for the prosecution to show that [the defendant] . . . knowingly delivered or aided in the delivery of some amount of cocaine,” as long as the jury determines that at least the charged minimum weight of cocaine mixture was in fact delivered. *Id.* at 628.

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<sup>2</sup> The prosecution is not required to prove as an element of the offense lack of legal authorization to deliver the controlled substance. MCL 333.7531; *People v Wooster*, 143 Mich App 513, 515-516; 372 NW2d 353 (1985). If a defendant introduces evidence of legal authorization, the prosecution then must prove the contrary beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278, 293 n 15; 523 NW2d 325 (1994).

There was sufficient evidence that defendant's sons unlawfully delivered cocaine and that defendant assisted his sons in delivering it. Detective Bauman testified that that he bought cocaine from defendant's sons on several occasions. Detective Bauman testified that on April 16, 2009, he purchased 500 grams of cocaine from defendant's sons. He also testified that on April 30, 2009, he arranged to purchase 1,000 grams of cocaine and that the cocaine mixture defendant's sons delivered weighed 977.3 grams. Rocky also testified that he drove defendant's son to Meijer, where Daniel Cluesman delivered cocaine to the undercover detective. Taken together, in the light most favorable to the prosecution, this is sufficient evidence for rational jurors to find beyond a reasonable doubt that defendant's sons, Michael and Daniel, committed the crime charged.

There was also sufficient evidence for a reasonable fact-finder to conclude that defendant performed acts or gave encouragement that assisted the commission of the crime. Specifically, Rocky testified that defendant brought a microwave, bowl, blender and kilo press to his son, David Witkowski's, house. His sons used these tools in the mixing, processing, and packaging of the cocaine mixture. The evidence shows that defendant was well aware that these tools were to be used in the processing of cocaine for delivery. He also cleaned the tools and dishes his sons used in preparing the cocaine for delivery. Defendant also allowed his sons to use his vehicle knowing that it was being used as a look out vehicle during one of the drug transactions. Defendant also sampled the cocaine and suggested its quality was inferior. This is sufficient evidence that defendant performed acts that assisted his sons in committing the charged crime. Thus, viewed in the light most favorable to the prosecution, sufficient evidence was presented to establish all of the elements of aiding and abetting the offense of delivery of 450 to 999 grams of cocaine.

We affirm.

/s/ Elizabeth L. Gleicher  
/s/ David H. Sawyer  
/s/ Jane E. Markey